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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 369

LEO J. MEYBERG COMPANY, a corporation,
Petitioner,
vs.
EUREKA WILLIAMS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

H. W. GLENSOR,
976 Mills Building, San Francisco 4, California,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Petition for Writ of Certiorari	1
Jurisdiction	2
Question presented	2
Statement of the case	2
Appendix	i-iii

Table of Authorities Cited

Cases

	Pages
Paramount-Lasky v. United States, 282 U.S. 30, 51 S. Ct. 42	6
Richfield Oil Co. v. United States, 343 U.S. 922, 72 S. Ct. 665, 99 Fed. Supp. 280	7, 9, 10
Standard Oil Co. v. Fed. Trade Com., 340 U.S. 231, 71 S. Ct. 240	6

Statutes

15 U.S.C.A., Section 14 (Clayton Act, Section 3)	2, 4, App. i, ii
15 U.S.C.A., Section 15 (Clayton Act, Section 4)	2, 10
28 U.S.C.A., Section 225 (Judicial Code, Section 129)	2
28 U.S.C.A., Section 1254	2

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Leo J. Meyberg Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, rendered and entered on July 30, 1954.

The decision of the Court of Appeals is not yet printed in the Federal Reporter.

JURISDICTION.

The District Court had jurisdiction of the action under Section 4 of the Act of October 15, 1914, Section 15, Title 15, U.S.C.A. (Clayton Act). The Court of Appeals had jurisdiction under Judicial Code, Section 129; Title 28, U.S.C.A., Section 225.

The jurisdiction of this Court is invoked under Section 1254, 28 U.S.C.A.

QUESTIONS PRESENTED.

1. Can a manufacturer, having a contract of long standing with a distributor, which is cancellable at will, and which contract does not *upon its face*, require the distributor to refrain from selling the goods of a competitor, cancel the contract and refuse to sell its goods to the distributor, solely and avowedly because the distributor is selling competing goods, or is such conduct a violation of section 3 of the Clayton Act for which damages may be recovered?

2. Is such act of the manufacturer illegal under a prior decision of this Court?

STATEMENT OF THE CASE.

Petitioner filed an amended complaint, a motion to dismiss was interposed and granted, judgment entered for defendant and plaintiff appealed. The original complaint was included in the record below, upon demand of respondent. We do not see that

it serves any useful purpose and will not further discuss it.

The amended complaint and its exhibits (Rec. pp. 7-23) show the following facts:

Petitioner is a California corporation engaged in the sale of merchandise, including vacuum cleaners, in the States of California, Arizona and Nevada.

Respondent manufactures at its plant in Illinois, a vacuum cleaner known as the Eureka (Rec. 7-8).

Since 1944, petitioner has been the distributor of the Eureka vacuum cleaner for respondent throughout the State of California, twelve counties in Nevada and one county in Arizona under a continuing written agreement attached to the complaint and marked "Exhibit A" (Rec. 10-21) dated September 29, 1944. This contract was cancellable at the will of either party (Rec. 13-14). Under this contract petitioner had bought and resold vacuum cleaners in the territory covered by the agreement.

The complaint alleges (Rec. 9) that since the date of the contract the petitioner has been the distributor under said agreement, has worked up an extensive good will and through the purchase and resale of said vacuum cleaners has earned a profit of approximately $20,000.00 per year.

In July 1952, respondent notified petitioner that it must cease selling the goods of a competitor, to-wit: the Hoover Vacuum Cleaner. The telegrams by which this notice was conveyed are attached as exhibits to the complaint (Rec. 22, 23) and they state inter alia:

"Hoovers and Eurekas just can't live together in the same house any longer", and that to have the Hoovers sold by the same salesmen who were also selling Eurekas created a situation that "is just impossible".

The complaint alleges that respondent thereupon cancelled purchase orders placed by petitioner for 1,000 vacuum cleaners and refused to sell the thousand or any more vacuum cleaners to respondent, whereby it lost the good will in the territory that it had built up through its efforts, and at its expense, since 1944; its distribution of vacuum cleaners has been substantially diminished, and the free movement and sale of vacuum cleaners in interstate commerce has been substantially lessened and prohibited to plaintiff's damage in the sum of one hundred thousand dollars ($100,000.00).

Section 3 of the Clayton Act (15 U.S.C.A., section 14) provides:

> "It shall be unlawful for any person engaged in commerce in the course of such commerce, to lease or make a sale or contract for sale of goods * * * on the condition, agreement or understanding that the lessee or purchaser shall not use or deal in the goods, ware, merchandise, machinery or other supplies of a competitor or competitors of the lessor or seller, * * *"

The petitioner contends that since section 3 of the Clayton Act (U.S.C.A. Title 15, section 14) prohibits the making of a contract *conditioned* upon an agreement to not handle competing goods it establishes the public policy of the United States; that it is as much

a violation of the Act to cancel a contract for such a reason as it would be to make a contract containing a clause prohibiting the handling of competitive goods in the first place. The Circuit Court met this contention head on. Its decision is placed upon the narrow ground that inasmuch as the agreement did not *upon its face* prohibit or purport to prohibit the distributor from dealing in competitive merchandise, there was not and could not be a violation of the quoted portion of the Clayton Act, saying:

> "Prior to July, 1952, the contract between the parties did not forbid appellant to deal in products of a competitor of appellee. After July, 1952, there was no contract, lease or sale between the parties at all. It is manifest that there could be no violation of said section 3 by entering into an illegal lease, sale or contract." (Rec. pp. 36, 37.)

The question is thus squarely presented under the act as interpreted by this Court in a case hereafter cited: is it a violation of the Clayton Act for a manufacturer to do indirectly what the Act prevents him from doing directly?

If it is such a violation the petition for certiorari should be granted. The question has been decided by this Court and the decision of the Court of Appeals squarely conflicts with the decision of this Court. For that reason, also, the petition should be granted.

The decisions of this Court arising under the Sherman Act as amended by the Clayton Act indicate forcefully that this Court will not tolerate any evasion of the anti-trust laws by subterfuge, or by strict ad-

herence to the letter of the law, while avoiding compliance with its intent and spirit. This Court has said:

> "The heart of our national economic policy, long has been faith in the value of competition. In the Sherman-Clayton Act as well as in the Robinson-Patman Act, Congress was dealing with competition which it sought to protect, and monopoly which it sought to prevent."
>
> *Standard Oil Co. v. Fed. Trade Com.,* 340 U.S. 231, 71 S. Ct. 240, 249.

and

> "In order to establish violation of the Sherman Anti-Trust Act, it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration. The prohibitions of the statute cannot be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results."
>
> *Paramount-Lasky v. United States,* 282 U.S. 30, 51 S. Ct. 42, 45.

In the light of these declarations it is highly unreasonable to say that a producer of goods moving in interstate commerce can make a contract to sell those goods to a distributor, which contract states *nothing* about dealing in the goods of a competitor and is, therefore, a *literal* compliance with section 3

of the Clayton Act, and then cancel that agreement for the open, avowed and declared reason that the distributor is, in fact, dealing in the goods of such competitor.

To so state is to say that the distributor may do indirectly what the law prohibits it from doing directly; that by complying with the *letter* of the law, one may evade its intent and spirit, and to point out judicially an easy method of evading the law. It seems to us unthinkable; contrary to all thinking of one who has labored in the law. We do not think it is the law as declared by this Court which we have pointed out from the inception of this case and we therefore turn to the decision which we submit is controlling.

The case to which we referred above as conflicting with this decision, is *Richfield Oil Co. v. United States,* 343 U.S. 922, 72 S. Ct. 665, affirming without opinion a decision of the District Court for the Southern District of California, reported under the same title in 99 Fed. Sup. 280.

Inasmuch as this Court affirmed the decision without opinion, it is necessary to refer to the opinion of the District Court to ascertain just what was affirmed and thus declared as the law, in that case.

It appears from the decision that the Richfield Oil Co. had three classes of stations, which were involved in the case. Of the first class considered by the Court, the L.O. stations, the defendant admitted that it had a side agreement with its lessees, that nothing but

Richfield products could be handled. This fact distinguishes it from this case, so far as this class of station is concerned and need not be considered further. Here there was no side agreement.

The same is *not* true however, so far as the other two classes of station are concerned. Of those two classes of stations the trial court said:

> "Richfield's witnesses testified that the instructions to their representatives were 'to persuade' the dealers working either under 337 or 3-C arrangements to confine themselves to Richfield products. *On the other hand, individual operators of these types of stations have testified to the fact that they were 'coerced' into limiting themselves to Richfield products, that they were 'called on the carpet', as it were, if other products were on their shelves.*" (Italics supplied.) * * *
>
> "There is also evidence that, despite the asserted independence of these operators so far as TBA products are concerned, in reality, there was coercion to induce them to confine their dealings to the sponsored products. In truth, *there is evidence that the policy of the Company was that if 'any dealer' refused to interest himself in Richfield sponsored TBA products, 'then it's a new dealer',—i.e., the instructions were to cancel the arrangement whatever it was.*" (Italics supplied; 99 Fed. Sup. 295, 296.)

There was some conflicting testimony relating to those stations and the Court went on to say:

> "So the trier of facts must choose. And, when confronted by a series of instruments, the sole

object of which is to tie these stations to contracts which, in effect, are *requirement* contracts, although not so denominated, the testimony of the men in the field who actually were told that they *could not* trade freely with outsiders fits into the scheme which the sales contracts coupled with the leases, and the sales contracts coupled with the painting agreements, evidently were intended to set up.

We conclude, therefore, that the agreements relating to L-O, 337 and 3-C stations under which Richfield has operated in the six named States, are, and each of them is, in their creation and effect, in violation of Section 1 of the Sherman Anti-Trust Act and Section 3 of the Clayton Act." (Op. 296.)

From the beginning of this case, we have tried in vain to perceive a distinction between the decision of the Court in the *Richfield* case and the acts of respondent in this case. The trial Court passed it by, saying:

"that case is not opposite (sic) because the exclusive dealerships, there held illegal had a clear competition impact in view of the fact that thousands of filling stations were involved." (Rec. 26.)

In other words, the Richfield Oil Company is a bigger company, does more business, has more stations, than has the petitioner in this case. A complete answer is that the size of the petitioner's business does not appear in the complaint and it is not a matter of which the Courts can take judicial notice.

If it was unlawful for the Richfield Oil Company to coerce its retail outlets into handling Richfield products exclusively, and if the Richfield Company could have been, should have been and was enjoined from such unlawful practice, the same law and reasoning applies to Eureka Williams Company in this case. Whether Leo J. Meyberg Company, the petitioner here has been damaged in its business or property (USCA Title 15, Sec. 15) by such practices is a question of fact, which may only be determined after a trial.

The Court of Appeals did not touch upon the matter at all, but placed its decision upon the ground that the agency agreement in this case, did not, in terms, forbid dealing in competitive merchandise.

We submit that there is a clear conflict between these decisions. If the decision of the Circuit Court is allowed to stand, lawyers and judges will never be able to determine which of the two lines of decision prevails. Furthermore, it will be an invitation to persons to take a chance at evading the law, in the hope that Courts will ultimately follow the decision in this case rather than that of this Court in the *Richfield Oil* case.

We submit the writ should be granted in this case and one or the other of the lines of thought involved be declared as law for the government of business men in the future.

Wherefore, your petitioner, Leo J. Meyberg Company, a corporation, respectfully prays that a writ of

certiorari out of and under the seal of this Honorable Court be issued to review the judgment of the said United States Court of Appeals in and for the Ninth Circuit in the case of *Leo J. Meyberg Company, a corportation v. Eureka Williams Corporation,* Case No. 13877, and that the said judgment may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, San Francisco, California,
September 27, 1954.

Respectfully submitted,
H. W. GLENSOR,
Attorney for Petitioner.

The contract (of 1944) previously existing between the parties was, by its terms, terminable at will, and contained no provision violative of §3 of the Clayton Act. In July, 1952, appellee terminated the contract by telegram for the reason heretofore stated, because appellant was continuing to deal in the product of a competitor of appellee.

Prior to July, 1952, the contract between the parties did not forbid appellant to deal in products of a competitor of appellee. After July, 1952, there was no contract, lease or sale between the parties at all. It is manifest that there could be no violation of said §3 by entering into an illegal lease, sale or contract.

The judgment of the district court dismissing this case must therefore be, and it hereby is, affirmed.

(Endorsed:) Per Curiam Opinion. Filed Jul. 30, 1954. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

LEO J. MEYBERG COMPANY, a corporation, *Appellant,* vs. EUREKA WILLIAMS CORPORATION, *Appellee.*	No. 13,877

Appeal from the United States District Court
for the Northern District of California,
Southern Division

JUDGMENT

This Court came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment

Filed and entered: July 30, 1954.

PAUL P. O'BRIEN, Clerk.